Supreme Court, U.S.
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No. 96-1684

In The

Supreme Court of the United States

October Term, 1996

IN RE ESTATE OF EDNA CLARA REEDY
Deceased

LAWRENCE B. MUCKLOW,
Petitioner,

vs.

SHERRY E. FARROW HARVEY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA'S SUPREME COURT AND/OR TO ITS FOURTH DISTRICT COURT OF APPEAL, DIV. TWO

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1.

Does California's "nonpublication" law [California Rules of Court, rules 976-979] whereby the California Supreme Court can without granting judicial review, and without explaining its reasoning, abrogate the precedential value of an aberrant appellate opinion by making the suspect decision disappear for all except the involved litigants (the "*California vacatur*"), mark an abridgment of important fundamental rights of petition, due process, and equal protection of the laws?

2.

Where a state's legislature and its lower court of appeal have contemporaneously spoken, but inconsistently so, on a questioned matter that is governed by statutory law, not by common law, and a *California vacatur* had been issued on the inconsistent appellate opinion, does the state court of last resort violate its constitutional duty of judicial review when it abstains from adjudicating the re-asserted direct conflict between the judicial construction and legislative clarification of the questioned statute?

3.

Where statutory law, not common law, governs a state's intestate succession law, is the *separation of powers* clause of the Constitution violated by a court decree that directs distribution of an intestate estate to the children of decedent's adopted-out child when the states's legislature has unambiguously legislated that children of adoptees do not inherit from their natural grandparent because the adoption has severed the parent-child relationship through which succession rights flow?

THE INTERESTED PARTIES TO THE CASE

As previously stated in the Petition's prefatory pages [*Pet ii*], three separate inheritance claims are asserted in this probate case:

1. The claim asserted by petitioner herein, LAWRENCE B. MUCKLOW,[1] (brother of the decedent) who reflects the inheritance interests claimed by decedent's 23 siblings and nieces and nephews, who inherit *if* the decedent left neither spouse nor issue.

2. The claim asserted by co-appellant below, VIVIENNE LYNN KIRK , (grandchild of decedent's pre-deceased husband) who succeeds to half of the former community-property home, *if* the decedent left neither spouse nor issue.

3. The claim asserted by the respondents, SHERRY FARROW HARVEY, THOMAS O. FARROW and JAMES E. FARROW, (three children of an adoptee) who profess to be the decedent's biological grandchildren -- and thereon -- claim the entire inheritance as decedent's lawful "*issue.*"

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1. In their footnotes [*Pet. ftns. 1 and 2; Opp. ftn.1*], both the Petition and Respondents' Brief in Opposition report Lawrence B. Mucklow died on January 7, 1995 while this case was pending on appeal. (*Respondents wrongly state that Mr. Mucklow died "two days after filing the present appeal." In fact, the appeal was filed, on July 5, 1994, six months before Mr. Mucklow died.) As previously said [*Pet. ftn. 1*], Mr. Mucklow's still open probate expressly lists this appeal in his estate. The executor of the estate, Karyn L. Story, has elected to continue the action without seeking a change in the name of the parties during the appeal, as is permitted. California law provides that during the pendency of an appeal the trial judgment, though entered, is suspended. The statutes cited by Respondents, requiring a formal change of parties upon the death of a litigant in order to continue the action, do not apply to a "pending appeal," particularly not where probate is still open.

Respondents argue [*see, Opp. ftn. 1, p. i-ii*] that Karyn Story, the executor, lacks standing to pursue a Petition for Writ of Certiorari in Mr. Mucklow's name. The argument seems to rest on Respondents' mistaken belief that pursuing a writ of certiorari in the U.S. Supreme Court is not part of the "appeal" process and/or that Karyn Story does not have authority to continue the appeal. Respondents are wrong. California law holds that, where a writ of certiorari to the U.S. Supreme Court is taken, the "appeal is pending" until that highest legal authority has responded. See for instance, *Rosenthal vs. Wilner* (1988) 197 CA 3d 1327, 1333-1334.

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No. 96-1684

PETITIONER'S REPLY BRIEF

The Respondents' Brief in Opposition exposes not only a basic misunderstanding/misinterpretation of the Petition but underscores and highlights why the Court should grant the Petition.

Petitioner does not, as Respondents assert, seek "a federal rule to mandate every state court of the United States to publish every opinion ever rendered" [*Opp. 25*]. Rather, the Petition's focus is appropriately limited and is very reasonable. The Petition plainly states when, in Petitioner's view, the need to "publish" an appeal opinion rises to the level of a mandate [*see, Pet. 19*]:

> Obviously, opinions that determine cases based on already established rules of law need not be published because the rule already exists. *But when an opinion establishes a previously unrecognized rule, or alters or modifies an existing rule, such opinion should be (and historically is required to be) published so that all others can be guided by it, and the newly created rule is not a "judicial secret."* (emphasis added).

Moreover, Petitioner has also clearly defined the <u>limited situation</u> where, he believes, the California Supreme Court's failure to authorize publication of an appellate opinion (which is associated with a failure to grant review of the opinion[2]) rises to the level of unconstitutional conduct. [*Pet. 19-20*]. To wit:

> If the Supreme Court decides not to publish, and/or to depublish, an appellate opinion that conflicts with a published legislative pronouncement on the same subject, the legislative rule remains the operative one for all except those who are a party to the case for which a different rule of law was adjudicated. Unless there is sufficient "rational reason" for not reviewing the case and for not publishing the opinion, the selective "unequal" application of a law through discretionary nonreview and discretionary nonpublication is clearly unconstitutional.

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2. Under existing California law, all opinions of the Supreme Court are published in the Official Reports, [Cal. Rule of Court, rule 976(a); *see, Pet. App 33*], and, unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action is published. [Cal. Rule of Court, rule 976(d); *see, Pet. App 34*].

OVERVIEW: WHY THE CONSTITUTIONALITY OF NONPUBLICATION IS AN IMPORTANT QUESTION

As explained more fully hereinafter, Petitioner submits that his Petition, over California's depublication\nonpublication\nonreview practice (the "*California Vacatur*") presents the court with an actual controversy of important and ripe constitutional questions, which, to the extent possible under the California judicial system,[3] were both "pressed and passed upon below."

Petitioner believes that the proper interpretation of the constitutional and statutory authority to publish or not to publish or to "depublish" an opinion (which is necessarily allied with the authority to review or not to review the opinion) lies in the analysis of the functions of the courts of appeal and the supreme court. The appeal process has two functions, private-purpose error correcting and

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3. The California Supreme Court is, of course, the final arbiter on which decisions get published and which do not in California. No federal constitutional rights of the Petitioner were infringed upon until the decision was made not to grant review and not to publish. One legal commentator, Professor STEPHEN R. BARNETT, of Boalt Hall, *infra*, note 12, at 1055-1057 *ibid* 1084, suggests that the constitutionality of the supreme court's decision not to publish and not to grant review might be challengeable by a "petition for rehearing" of the supreme court order denying review and ordering depublication (or declining the request for publication). In the instant case, the possibility of mounting such a challenge became impossible when the remittitur issued virtually immediately, and the court of appeal declined Petitioner's efforts to stay its issuance and/or to recall the remittitur. [*See*, Reply Appendix "A" hereto -- May 1, 1997 court ruling on Petitioner's December 30, 1996 motion to recall the remittitur.]

However, in an effort to exhaust all possibilities of further remedies in California, and to create room to press the California constitutional questions that blossomed when the California Supreme Court declined review and failed to publish, Petitioner sought a rehearing on the motion. [*See*, Reply Appendix "B" hereto -- Petition for Rehearing of Motion to Recall Remittitur.]

Respondents have opposed the Petition for Rehearing. To date, there have been no additional rulings on the matter, and jurisdiction over the cause has now passed to the California Supreme Court, pursuant to California Rule of Court, rule 28(a). Under said rule, the California Supreme Court has jurisdiction over the cause for 30 days, which may be extended to 90 days upon the court's motion or a showing of good cause.

public-purpose law shaping. The primary function of the courts of appeal is error correcting. In contrast, the supreme court's primary function is that of law defining and law development. Nevertheless, the two functions are necessarily intertwined. As it adapts the common law and interprets the statutes in deciding whether a trial court has erred, the court of appeal performs the later function, the public-purpose function of law-defining and law development. And, those appeal decisions that do define, develop or shape the law, are to be published [*see*, California Rules of Court, rule 976(b) *at, Pet. App 33-34*]. Similarly, when the supreme court, in its law-shaping mode, reviews an appeal opinion to determine whether the law had been properly adapted, defined or shaped by the court of appeal below, it does so by performing an error correcting function. For the litigants in the case, it is the "court of last resort."

As Respondents correctly point out in their brief, there are constitutional strictures against making purely advisory rulings. These constraints on judicial power demand that the supreme court's public function of shaping the law occur only in the context of private error correcting. The defining power vested in the courts by the Constitution, whether California or federal, is the resolution of actual controversies as opposed to rendering advisory opinions or other rulings that have no effect on deciding a dispute between litigants.[4]

It is, therefore, highly significant, and troubling, that increasingly the law in this land is being shaped not by overt publication of the legal decisions that determine controversies between parties, but by their covert "nonpublication." Hidden, unexplained (unscrutinizeable) decisions tend to erode public confidence in the judiciary. Because it is efficient, some form of "selective publication" is probably used in most, if not all, jurisdictions today. The practice of "depublication" is unique to California.

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4. Professor, STEVEN R. BARNETT, of Boalt Hall agrees. See, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*. 26 LOY. LA L. REV 1033, 1037-1039 (1993): "For the federal courts, this limit on judicial power is embodied in the "case or controversy" requirement of Article III of the Federal Constitution. The California courts likewise recognize and apply the "case or controversy" requirement as a condition of the judicial power conferred on them by Article VI of the California Constitution."

Reportedly, over sixty percent of federal appellate decisions are not published.[5] In California, in the fiscal year of 1994-1995, only eight percent of the appeal opinions were published, while two years earlier, nine percent were published.[6] Five years before that about fifteen percent of California's appeal court decisions were certified for publication,[7] of which the supreme court ordered an additional ten percent depublished.[8] Each year, the California Supreme Court depublishes more appellate opinions than it publishes opinions of its own.[9] The reason for the increasing use of "nonpublication" is obvious: *the eraser is more efficient than the pencil.*[10] But the framers of the Constitution did not intend to sacrifice the public nature of the judicial process on the altar of efficiency.

Though the California Supreme Court has maintained absolute silence on the subject, a brigade of critics have written on the controversial nonpublication practice, calling for, at least, its curtailment and an explanation from the courts, if not an end to the practice.[11] Professor Barnett says that "the deepest objection to

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5. *See*, HOWARD SLAVITT, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication and Vacatur*, 30 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW, 109,120 (1995).

6. *See*, SCOTT GRAHAM, *Putting it in Reverse*, THE RECORDER, (Dec. 6, 1996)

7. *See*, GERALD F. UELMEN, *Losing Steam*, CAL LAW., (June 1990) at 33, 44.

8. *See*, PHILIP L. DUBOIS, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469, 488 (1988).

9. See, GERALD F. UELMEN, *supra*, Note 6, at 43.

10. *See*, GERALD F. UELMEN, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?* 26 LOY. LA L. REV. 1007 (1993)

11. *E.g.*, STEPHEN R. BARNETT, *supra*, Note, 4, *infra*, Note 12; also, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine begins to Self-Destruct*, 45 HASTINGS L. J. 519 (1994); Professor Barnett believes depublication exceeds the constitutional power that is granted the courts (*infra*, Note 12), and that "nonpublication" is, in any event,

(continued...)

depublication is that it exceeds the judicial power." [12] In a well-researched treatise on the subject, Howard Slavitt, writing for the *Harvard Civil Rights-Civil Liberties Law Review*, submits that nonpublication "destroy(s) equal access to the system of precedent," and "hinders the possibility of receiving a grant of review." He further maintains that: "In addition to undermining the appearance of justice, nonpublication interferes with the separation of powers

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11.(...continued)
undermined by computer-age legal research. J. CLARK KELSO, *A Report on the California Appellate System*, 45 HASTINGS L. J. 433 (1994) at 496: Professor Kelso thinks depublication "is a practice that should be stopped." He condemns the unfairness of the practice, noting, at 491, that systems of nonpublication "bestow an unfair advantage" on litigants who possess the resources to collect unpublished opinions so as to exploit, "sub silento," their status as actual precedent. GERALD F. UELMEN, *supra*, Notes 7 and 10; also, *Depublication: The paper trail leading to a depublication should be accessible to everyone*, LA LAW., (Aug.-Sept. 1990) at 55. Professor Uelmen writes extensively on the subject and particularly decries the "secret" nature of the practice and notes that the increase in nonpublication closely correlates to a decrease in the grants of review by the Supreme Court. HOWARD SLAVITT, *supra*, Note 5, *infra*, Note 13, at, 109-110, writes: "The Due-Process Clause protects the integrity of the dispute-resolving role, but there is no corresponding constitutional guarantee to protect the integrity of the courts' law expounding function. This lack of systematic safeguards threatens the judiciary's ability to make principled decisions. The widespread use of effacing precedents -- selective publication, depublication, and vacatur motions -- evidences the need to protect the judiciary's law-expounding function."

12. *See*, STEVEN R. BARNETT, *supra* note 4, at 1037. Professor Barnett is of the opinion that depublication exceeds the judicial power that is conferred on the courts by the Constitution because: "Depublication, while it serves the court's function of making the law for the future, cannot be squared with dispute resolution as a defining attribute of judicial power. When the supreme court depublishes a court of appeal opinion, it dissolves no dispute, since the appellate court's decision stands. The same is true, to be sure, when the supreme court simply denies review of a court of appeal decision. The additional act of depublication, however, makes law – if only eliminating the appellate opinion as citeable precedent – and the law thus made is not supported by the decision of any case. It shares no ground with the appellate decision left standing; rather it impeaches that decision." (*supra* note 3, at 1039-1040).

between the judicial and political branches." He says, "because nonpublication often hides the actual state of the law it may substantially reduce the possibility of legislative reversal." He sees a threat to the separation of powers doctrine caused by nonpublication of appeal opinions: "Part of the justification for allowing a counter-majoritarian judiciary to interpret laws is that, except on constitutional issues, legislatures can overrule courts. Thus nonpublication may prevent legislatures from adequately policing judicial abuses."[13]

While the expansive views of the legal scholars point to the general importance of the "nonpublication" issue, Petitioner's perspective is necessarily personal and limited to his "injury in fact" and to the actual "controversy" he presents.

THE CONSTITUTIONAL QUESTIONS PRESENTED ARE RIPE FOR REVIEW AND PRESENT AN ACTUAL CONTROVERSY

Although Respondents articulate their argument obliquely, they suggest that Petitioner lacks standing under the "case or controversy" requirement of Article III of the Constitution [*Opp.* 6]. Respondents are mistaken. The Petition demonstrates both the jurisdictional and the prudential elements of "standing." *See*, the recently decided case of *Bennett vs. Spear*__, No. 95-813 (March, 1997). 1. Petitioner suffered an "injury in fact" when the Supreme Court of California directed nonpublication, rather than review, of the appeal opinion that conflicted with the legislative pronouncement on the subject of his right to receive distribution from decedents' estate. The harm is of constitutional proportions because, as a result of the "nonpublication" directive, Petitioner is subject to a law which, under California's Rules for Publication of Appellate Opinions [*Pet. App 33-37*] is not to be applied to anyone else -- including not to heirs, or potential heirs, of other probate estates who would be affected by the rule of *Reedy I and II*, were it published. 2. The harm is "fairly traceable" to the actions of Respondents who opposed Petitioner's claim at each step of the judicial process. 3. The harm is likely to be

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13. *See*, SLAVITT, *supra*, Note 4, at 119, 127, 133

"redressed by a favorable decision" because the questioned depublication order in *Reedy I*, and the nonpublication order in *Reedy II*, eliminated an unavoidable conflict with an intervening legislative enactment [Calif. Prob C. §6451]. But for the ordered nonpublications of the opinions, said conflict would very likely have required a supreme court review and reversal, or at the very least, "GVR" order. See generally, *United States vs. Schooner Peggy*, 1 Cranch 103, 110 (1801) ["if subsequent to a judgment, entered by a lower court, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."][14]

Petitioner presents a clear case where the "deny review and depublish" procedure of shaping the law has impermissibly infringed upon fundamental rights guaranteed him by the federal Constitution. To wit, not once, but twice, the appellate tribunal proclaimed a previously unrecognized (and now discredited) rule of law for California -- *that children of an adopted-out child are entitled to inherit from their biological grandmother.* Twice, the Supreme Court refused to publish said rule as the law of the state and, twice, declined to review it for error. First, in *Reedy I*, on December 16, 1993, the Supreme Court "depublished" the court-created rule (after having been alerted to the fact that the questioned legislation had been clarified by a re-codification which would take effect on January 1, 1994, well before any distribution of the estate could occur). Then,

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14. Respondents' comfort in the fact that *Reedy I* became final and "law of the case" for *Reedy II*, before the new legislation took effect, is misplaced. This Court has "jurisdiction to consider all of the substantial questions determined in the earlier stages of state proceedings, ...and [the] right to re-examine such questions is not affected by a ruling that the first decisions of the state court became law of the case." *Hathorn vs. Lovorn*, 457 U.S. 255, 261 (1982). When the opinion in *Reedy I* was "denied review and depublished" on December 16, 1993, the supreme court was informed of the intervening legislation that had positively changed the *rule of Reedy* which would become law on January 1, 1994. Had the court reviewed *Reedy I* for error, or it least GVR'd it, in light of the new legislation, rather than depublished, *Reedy I* would not have become final before the new legislation took effect. In that event, the law of *Reedy I* could not have determined the result in *Reedy II*.

in *Reedy II*, when faced with the replication of the "depublished" rule, the court again refused to approve its publication as the law of California, but also, again, declined to review it for error. Thus, the disapproved decision stands to determine distribution of the Reedy estate only. No other estate is affected by the "law of Reedy."

Arguably, the unexplained 1993 "depublication" order was initially an efficient, and harmless, application of the Supreme Court's law-shaping function. It would have been reasonable for the Supreme Court to expect that the clarifying re-codification of the questioned statute would supersede the court-created rule of law.[15] However, when *Reedy II* replicated the depublished rule of *Reedy I*, as "law of the case," rather than implementing the clarified legislative rule, the Petitioner was harmed. And, when the Supreme Court declined to review the reasserted decision for error, opting, instead, to again refuse it publication so the resurrected decisional rule would remain a "judicial outcast" which applied to the Reedy case only, the Petitioner was not only harmed, he was also the victim of an "unequal" and, therefore, unconstitutional application of the law.[16]

The constitutional questions presented by this case are now ripe for review in this Court. The state "court of last resort" has acted and has remained silent as to its reasons. Except for the extraordinary

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15. Respondents argue that Petitioner waived his right to seek review of the issues raised in this Petition by not filing a writ of certiorari in *Reedy I* when the California Supreme Court depublished that opinion [*Opp. 15*]. Such a writ did not lie at that point. Not only was Petitioner not harmed by the depublication\nonreview order of *Reedy I*, but issues of the constitutionality of the depublication\nonreview order were not then ripe for review. Distribution from the estate had not yet been denied to Petitioner, and it was entirely possible, in fact probable, that the 1993 re-codification of the questioned statute would be deemed to have superseded the rule of *Reedy I*. Moreover, the justices had offered no explanation for the depublication, and the question of the meaning and effect of "depublication" of *Reedy I* had not yet been pressed below. The question of "depublication" was, however, not only fully pressed in *Reedy II*, it became a central theme of the case in *Reedy II*.

16. California Rule of Court, rule 976(b)(1) and(2) [*see, Pet App 33*], directs that opinions which establish a "new rule of law" or which "resolve or create an apparent conflict in the law" be published.

procedure, described in footnote 3 above [see, Appendices "A" and "B" hereto] of recalling the remittitur and, perhaps, getting the court to rehear its "deny review and depublish" ruling and, at least, speak on the matter, for which there is no established procedure in the state, no further review in the state is possible.

THE COURT HAS JURISDICTION TO CONSIDER THE PRESENTED CONSTITUTIONAL QUESTIONS, FOR, TO THE EXTENT REASONABLY POSSIBLE, THEY WERE "PRESSED AND PASSED UPON BELOW." THE COURT ALSO HAS REASON TO TAKE JURISDICTION ON PRUDENTIAL GROUNDS AND "GVR" THE MATTER BACK TO THE CALIFORNIA SUPREME COURT FOR CONSIDERATION.

Petitioner makes no charge that he suffered any infringement of his federally guaranteed rights until publication of the opinion that denied him distribution from the estate was declined and review denied. Disregarding the fact that the "nonpublication-nonreview" decision is exclusively the province of the supreme court, Respondents also argue that this Court should refuse to grant certiorari because the issue of the constitutionality of the "*California vacatur*" practice, "was never raised at trial or appellate level for adjudication." [*Opp. 7, Cf., 12*]. Since neither the trial court, nor the inferior appellate court, are empowered to pass upon the constitutionality of the California vacatur practice, the issue of denial of "equal protection" resulting from the practice did not arise at those levels and was not raised there.

By implication, Respondents tacitly concede that the issue of the denial of equal protection rights resulting from a decision not to review and not to publish was specifically raised at the supreme court level [see, Pet. 12]. Moreover, as said above, the question of what "depublication" of the *Reedy I* opinion meant and what effect it had on the decisions to be made in *Reedy II* was raised and argued at every level and was a central theme of *Reedy II*.

The fact that Respondent formulates the questions he presents for review differently from the manner in which he raised the issue below is of no import. "A litigant seeking review in this court of a claim raised in the lower courts . . . possesses the ability to frame the

question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." [*Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)].

While Respondent clearly pressed his claim in the court below, it is true that the California Supreme Court has remained absolutely silent on the matter. It is also true that, as a matter of due regard, the California Supreme Court should be given every opportunity to consider the constitutionality of its own rules and conduct, before this court passes on them. Whether to interpret the silence as indication that the California Supreme had passed upon the constitutional claim that was pressed, and rejected it, thus making the questions presented here ripe for review in this court [*Illinois v. Gates*, 462 U.S. 213 (1983], or whether to interpret the silence as an "ambiguity which calls into question to take and decide the case," so as to invoke this court's "GVR" power [*Lawrence vs. Chatter* __, No. 94-9323, 116 s. Ct. 611 (1996)] is within the prudential discretion of this court.

CONCLUSION

In any event, it is clear that this court is not restrained by jurisdictional concerns from granting certiorari. It does appear that "*the eraser has become mightier than the pencil.*" Unscrutinizeable depublication, nonpublication and vacatur are increasingly becoming the manner by which the law of this land is being shaped. The appearance of justice, fairness, and the public's trust of the judicial system are at risk. The constitutional questions presented here over the "*California vacatur*" practice are important and involve an actual controversy. They should be resolved.

June 6, 1997.

Respectfully submitted,

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REPLY APPENDIX "A"
CALIFORNIA COURT OF APPEAL
RULING ON MOTION

FILED
MAY 1, 1997

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

Estate of EDNA CLARA REEDY,
Deceased.

SHERRY E. FARROW HARVEY, et al.,
Petitioners and Respondents,

v.

LAWRENCE B. MUCKLOW et al.,
Objectors and Appellants.

E 014711
(Super.Ct.No.P61523)

County of Riverside

THE COURT

The court has considered the motion filed December 30, 1996, by appellant Lawrence B. Mucklow to recall the remittitur issued December 26, 1996. The court has also considered the opposition filed January 8, 1997, by respondents Sherry E. Farrow Harvey et al., and appellant's reply filed January 14, 1997.

The motion to recall the remittitur is DENIED.

Appellant contends that the remittitur should be recalled because it was mistakenly issued by the clerk of this court when a motion to stay issuance of the remittitur was pending. The stay motion was received by the clerk of this court on December 26, 1997, and returned to counsel without filing because the remittitur had already issued earlier that day. Appellant argues the stay motion was

constructively filed when it was mailed by certified mail on December 23, 1997, and was, therefore, pending before the remittitur issued. Appellant's reliance on California Rules of Court, rule 40(n) (inadvertently cited as rule 44(n)) is in error, because that rule applies only to briefs as defined in rule 40(k), which does not include motions or petitions, except for petitions for review or rehearing. Thus, the remittitur was not mistakenly issued while a stay motion was pending. Because no other ground for recalling the remittitur is applicable, the motion must be rejected. (See generally 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 603 et seq., p. 589 et seq.)

RAMIREZ

Presiding Justice

REPLY APPENDIX "B"
PETITION TO REHEAR REMITTITUR MOTION

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May 19, 1997

APPELLATE COURT OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

IN THE ESTATE OF
EDNA CLARA REEDY,
Deceased.

E 014711
(Super.Ct.No.P61523)

SHERRY E. FARROW HARVEY,
ET AL.,
Petitioners and Respondents,
v.

LAWRENCE B. MUCKLOW
VIVIENNE LYNN KIRK,
Objector-Claimant/Appellants.

APPELLANT MUCKLOW'S PETITION FOR REHEARING IN THE COURT OF APPEAL OF HIS MOTION TO RECALL REMITTITUR ISSUED DECEMBER 26, 1996

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE
HONORABLE WILLIAM H. SULLIVAN

APPELLANT, LAWRENCE B. MUCKLOW, having reviewed the court's ruling of May 1, 1997 and decision denying his motion of December 30, 1996 to recall the remittitur issued in this case on December 26, 1996 now submits this Petition for Rehearing in order to respectfully call to the court's attention certain omissions and overlooked material issues in said ruling.

PRELIMINARY STATEMENT

This case, over the effect of adoption on intestate succession rights, explores the significant constitutional concerns associated with

the judicial functions of deciding and shaping the law in the uncharted legal waters of California's nonpublication law. On April 17, 1997, Lawrence B. Mucklow ("Mucklow")[1] petitioned the United States Supreme Court for a Writ of Certiorari on the decisions and "non-decisions" made in this case. He had announced his intentions to seek such a petition when he made his requests to stay/recall the remittitur, issued on December 26, 1996, on the California Supreme Court order of December 18, 1996 denying review and denying publication of this court's opinion in the case. In fact, the expressed, principal reason for the request to stay/recall the issuance of the remittitur was/is so Appellant could have a fair opportunity to evaluate his legal position, research the relevant law and perfect his rights for possible further judicial review. [See, Motion to Recall Remittitur, page 5; Reply to Opposition to Motion to Recall Remittitur, page 7.] Without a recall of the remittitur, a reexamination of the "non-publication/non-review" decision in California, was/is impossible. All time to seek review of the decision before the United States Supreme Court expired on April 17, 1997 (a month before this court issued its ruling on the remittitur motion). Appellant's certiorari petition to that high court (USSC No. 96-1684, docketed on April 22, 1997) tenders the following questions.

1.

> Does California's "nonpublication" law [California Rules of Court, rules 976-979] whereby the California Supreme Court can without granting judicial review, and without explaining its reasoning, abrogate the precedential value of an aberrant appellate opinion by making the suspect decision disappear for all except the involved litigants (the "*California vacatur*"), mark an abridgment of important fundamental rights of petition, due process, and equal protection of the laws?

2.

> Where a state's legislature and its lower court of appeal have contemporaneously spoken, but inconsistently so, on a questioned matter that is governed by statutory law, not

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1. Lawrence B. Mucklow died in January of 1995, while this case was pending on appeal. A probate was opened, and Mr. Mucklow's daughter, Karyn Story, was granted letters. As his legal representative, she elected to continue the appeal in the name of the original parties.

by common law, and a *California vacatur* had been issued on the inconsistent appellate opinion, does the state court of last resort violate its constitutional duty of judicial review when it abstains from adjudicating the re-asserted direct conflict between the judicial construction and legislative clarification of the questioned statute?

3.

Where statutory law, not common law, governs a state's intestate succession law, is the *separation of powers* clause of the Constitution violated by a court decree that directs distribution of an intestate estate to the children of decedent's adopted-out child when the states's legislature has unambiguously legislated that children of adoptees do not inherit from their natural grandparent because the adoption has severed the parent-child relationship through which succession rights flow?

Though the California Supreme Court itself has remained silent on the matter, California's unique "nonpublication\ depublication" law (dubbed the "*California vacatur*" in the certiorari petition) is the subject of a great deal of comment, explication and criticism in the legal literature. Prominent examples of those questioning the practice include the Harvard--Civil Rights, Civil Liberties Law Review (1995); Professors, Stephen R. Barnett of Boalt Hall, Gerald F. Uelman of Santa Clara University School of Law, and J. Clark Kelso of McGeorge School of Law, have each written extensively on the subject. [See for instance, Barnett, "*The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct,*"45 Hastings L.J. 519 (1994); Uelmen, "*Is the Eraser Mightier than the Pencil*," 26 Loyola L A. Law Review 1007 (1993).] In a 1993 symposium, Professor Barnett opined that this method of shaping the law, "offends the concepts of judicial function" and "appears not to comply with the California Constitution." While he notes that the last word on the meaning of the California Constitution belongs to the California Supreme Court, he suggests the question of the constitutionality of the nonpublication law might be put to the California Supreme Court by a "petition for rehearing" of the order for depublication or denying publication. (26 Loyola LA L.Rev. 1033, 1084 (1993). Obviously, if the remittitur issued (as it did in this

case) before such a petition can be mounted, the challenge under the California Constitution to the "nonpublication" order, cannot be brought -- unless the remittitur is recalled.

In a December 6, 1996 article in the *Recorder*, Scott Graham reports that according to the most recent Judicial Council figures available, in the fiscal year of 1994-1995, only 8% of the appeal opinions were published. Since the high number of "unpublished" (unscruitinized) decisions tend to erode public confidence in the judiciary, the remittitur should be recalled for public policy reasons so that this "secret" way of shaping the California law can be openly adjudicated.

The remittitur should also be recalled so Appellant can exercise all remedies available under California law. (It is also possible that the United States Supreme Court might decline review of California's nonpublication law as being repugnant to the federal Constitution because it may be persuaded that not all California remedies were exhausted.)

DISCUSSION

THE POWER TO GRANT REHEARING

Appellate rule number 27 of the California Rules of Court provides that a Court of Appeal may grant a rehearing after its own decision on any cause [exceptions not relevant] ... before the decision becomes final. A decision of a Court of Appeal becomes final as to that court 30 days after filing. [Rule, 24]. A party seeking a rehearing ... must serve and file a petition therefore within 15 days after the filing of the decision. This court's decision denying Appellant's December 30, 1996 motion to recall the remittitur was filed on May 1, 1997. This petition for a rehearing is made within 15 days of said filing and is, therefore, timely.

The grounds for granting a rehearing have evolved mainly through case law but are also referred to in the statutory rules of appellate practice which provide that, in certain instances, a petition for rehearing must be filed to perfect the right to Supreme Court review. Early case law held that the appeals court may grant rehearing on the ground that the court's opinion *misstated* or *omitted* a material fact or misstated or *failed to address* any material issue. [*In re Jessup* (1889) 81 C 408, 471]. Appellate practice rules provide that, absent unusual circumstances, the Supreme court will not consider a

petition for review based on an issue or material fact that was omitted or misstated in an appellate opinion *unless* that omission or misstatement is first called to the attention of the court of appeal in a Petition for Rehearing. [See, CRC Rule, 29(b)(2)].

Consequently, with reference to the decision denying the request to recall the remittitur that this court issued in this appeal on May 1, 1997, the following misstated or omitted material facts and significant issues presented by the petition, are respectfully called to attention of the court, and a rehearing thereon is hereby requested.

APPELLANT'S DECEMBER 23, 1996 MOTION TO STAY ISSUANCE OF THE REMITTITUR WAS IN THE NATURE OF A "BRIEF." THE PROVISIONS UNDER RULE 40(n) FOR FILING BY "CERTIFIED MAIL" SHOULD THEREFORE HAVE BEEN APPLIED.

The court denied the motion to recall the remittitur on the ground that Appellant's motion was not a "brief" within the meaning of California Rule of Court, rule 40(k). As Appellant pointed out in his motion, a request to stay issuance of the remittitur is not an "extraordinary" proceeding [see *San Bernardino Comm. Hospital vs. Offices of Statewide Health Planning and Development* (1986) 187 CA 3d 457, 463]. Such a motion is, therefore, not expressly excluded from the definition of a "brief" within the meaning of rule 40(k). It should therefore be deemed to be "included" to effect justice. Particularly so, because in this case, the stay of issuance of the remittitur is/was a necessary pre-requisite to a petition for rehearing in the California Supreme Court. Petitions for rehearing are expressly <u>included</u> in the definition of a "brief."

CONCLUSION

For all the reasons stated, it is respectfully requested that this Petition for Rehearing be granted and the court direct that the remittitur issued on December 26, 1996 be recalled.

Dated: May 16, 1997

Respectfully submitted,

ERIKA W. SENTER, ESQ.
Attorney for Appellant,
Lawrence B. Mucklow

[proof of service omitted]